

# Continuing Evolution of Legal Mal Breach of Contract Claims; Professional Liability

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### Body

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In a legal malpractice action, a plaintiff may recover against his or her attorney under a trespass (negligence) or an assumpsit (breach of contract) theory. Historically in Pennsylvania, there was a clear distinction between legal malpractice claims sounding in breach of contract and those sounding in negligence.

For many years, consistent with general law regarding breach of contract, our courts maintained three elements are necessary to plead properly a legal malpractice cause of action for breach of contract: (1) the existence of a contract, including its essential terms, (2) a breach of a duty imposed by the contract and (3) resultant damages. The merits of a breach of the contract claim arising from legal representation were historically determined according to the specifics of the terms of the contract itself. Our courts repeatedly held a plaintiff does not state a true contract cause of action for legal malpractice by merely averring in the complaint that his or her "attorney failed to exercise the requisite duty of care." (See *Hoyer v. Frazee*, 323 Pa.Super 421, 424, 470 A.2d 990, 992--93 (1984)). Historically, to sustain such a claim, a plaintiff was -required to show the lawyer failed to follow the client's specific instructions or otherwise breached a specific provision of the contract. In *Rogers v. Williams*, 420 Pa.Super. 396, 401, 616 A.2d 1031, 1033 (1992), it was ruled that a client may sue an attorney for legal -malpractice on an assumpsit theory only "when the attorney failed to follow a specific instruction of the client." Allowing a plaintiff to proceed with a contract claim based upon a generalized allegation of breach of duty was seen as merely -sidestepping the two-year statute of limitations for a legal malpractice claim sounding in negligence.

The tenor of Pennsylvania case law changed radically with the Superior Court's decision in *Gorski v. Smith*, 812 A.2d 683, 694 (Pa. Super. 2002), where U.S. District Judge David Stewart Cercone of the Western District of Pennsylvania, writing for a three-judge panel, found "a breach of contract claim may properly be premised on an attorney's failure to fulfill his or her contractual duty to provide the agreed upon legal services in a manner consistent with the profession at large." The *Gorski* decision was based upon dicta from the Supreme Court of Pennsylvania's decision in *Bailey v. Tucker*, 533 Pa. 237, 251-52, 621 A.2d 108, 115 (1993). The *Bailey* case involved legal malpractice in the context of a criminal representation, and the court stated: "If any attorney agrees to provide his or her best efforts and fails to do so a [contract] action will accrue." The court explained an implicit contract with a client requires the lawyer "to provide that client with professional services consistent with those expected of the profession at large." Appeal was denied in the *Gorski* case, and our Supreme Court has not directly -addressed the issue.

Over the next 10 years, Pennsylvania courts effectively abrogated most of the traditional differences between a legal -malpractice action sounding in assumpsit as opposed to trespass, other than the obvious requirement of the existence of a contract, and an important question about the types of -damages available under the two claims. Since *Bailey*, our courts have generally held the damages available in legal malpractice breach of contract claims are limited to amounts actually paid for

services provided plus statutory interest, and have not -allowed consequential damages. That issue was set for review in *Coleman v. Duane Morris*, 58 A.3d 833 (Pa. 2013), before the parties settled that action.

Federal courts, unlike our state courts, have -resisted the temptation to conflate -negligence claims and breach of contract claims. Recent decisions by the Third Circuit and the Middle District of Pennsylvania provide a road map for re-asserting the distinction between the claims. In *New York Central Mutual Insurance v. Edelstein*, 2016 U.S. App. LEXIS 1661 \*2 Fed.Appx. (3d Cir. 2016), the court noted that in *Bruno v. Erie Insurance*, 106 A.3d 48 (Pa. 2014), the Pennsylvania Supreme Court reaffirmed the gist of the action doctrine determines whether a cause of action sounds in contract or in tort. The Supreme Court in *Bruno* explained, if "the facts of a particular claim establish that the duty breached is one created by the parties by the terms of the contract-i.e., a specific promise to do something that a party would not ordinarily have been obligated to do but for the existence of the contract," then the claim should be treated as one for breach of contract. The court continued, "if, however, the facts establish that the claim involves the defendant's violation of a broader social duty owed to all individuals, which is imposed by the law of torts and, hence, exists regardless of the contract, then it must be regarded as a tort." Put another way: "Whenever a plaintiff's complaint sets forth allegations which substantially constitute assertions of a defendant's complete failure to -perform duties originating from a contract-a -nonfeasance-the plaintiff's action will be deemed to be a breach of contract; whereas, if the allegations substantially concern the defendant's negligent breach of a duty which exists independently and regardless of the contract-a misfeasance-then the action will be regarded as one in tort." The *Edelstein* court adopted this in a legal malpractice action, stating a legal malpractice "claim sounds in negligence unless it is alleged that the party breached one of the 'specific executory promises which -comprise the contract.'"

The *Edelstein* opinion was subsequently adopted by the Middle District in *Rinker v. Amori*, No. 3:15-1293, 2016 U.S. Dist. LEXIS 36712, at \*19-20 (M.D. Pa. Mar. 22, 2016). The Middle District in *Rinker* -dismissed a contract claim against an attorney, finding the plaintiff did not allege a breach of a specific instruction or provision of any agreement between the parties, or a breach of a "specific executory promise" contained in any agreement.

Utilizing the logic in these two recent -federal court decisions applying Pennsylvania law, attorneys may be able to re-establish the distinctions between legal malpractice actions sounding in negligence and those sounding in breach of contract. ·

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